VIRGINIA LAW REGISTER

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Issued Monthly at $5 per Annum. Single Numbers, 50 cents.

All Communications should be addressed to the PUBLISHERS.

Interstate Commerce—Limitation of Liability and Regulation of Rates—The States Impotent.

With the rendition of the decision of the Supreme Court of the United States in Adams Express Co. *v.* Croninger, January 6, 1913, the case of Elliott *v.* The Atlantic Coast Line (N. C.), 75 S. E. R. 886, 18 Va. Law Reg. 705, ceased to be authority. At the same time decisions were rendered in the cases of C. St. P. M. & O. Ry. *v.* Latta, C. B. & Q. Ry. *v.* Miller, and C. R. & P. Ry. *v.* Hardwick Farmers Elevator Co., all of which practically put all State laws regulating interstate railway and express rates, and forbidding the limitation of liability, "out of business." The Supreme Court held that Congress had manifested a purpose to take possession of the subject of the liability of a carrier for interstate shipments, and that the regulation therein had superseded all State regulation upon the subject. In the Croninger case the question was upon charges for transportation based upon value. The article transported was not valued and under the bill of lading nothing in excess of $50 could be recovered. Under the laws of Kentucky such a provision in a bill of lading was held to be invalid and the shipper entitled to recover full value, except in cases of fraud or estoppel at common law. The State Court so decided, but the Supreme Court of the United States reversed the decision, holding that the amendment of June 29, 1906 (34 Stats. at Large 584), to the original Interstate Commerce Act of Feb. 4, 1887, from its general character superseded all regulations and policies of a particular state upon the same subject.

That amendment is as follows:

> "That any common carrier, railroad or transportation company receiving property for transportation from a point in one State to a point in another State shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder

thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered, or over whose line or lines such property may pass, and no contract, receipt, rule, or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed: Provided, That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law.

"That the common carrier, railroad or transportation company issuing such receipt or bill of lading shall be entitled to recover from the common carrier, railroad or transportation company on whose line the loss, damage or injury shall have been sustained, the amount of such loss, damage, or injury, as it may be required to pay to the owners of such property, as may be evidenced by any receipt, judgment, or transcript thereof."

It came before the Supreme Court in Atlantic Coast Line *v.* Riverside Mills in 219 U. S. 186, but the opinion and judgment in that case was confined to that provision of the Act which made the initial carrier liable for a loss upon the line of a connecting carrier, the property having been received under a bill of lading which confined the liability of the initial carrier to loss occurring upon its own line. Now the Supreme Court holds that this amendment is an evidence on the part of Congress to control the whole subject of the limitation of an interstate carrier's liability and nullifies all state legislation on the subject.

The C. St. P. M. & O. Ry. Co. *v.* Latta case was upon a bill of lading limiting the value of horses shipped from one state to another to one hundred dollars. The Supreme Court held this case to be governed by the Croninger case.

The C. B. & Q. Ry. *v.* Miller case was similar to the Latta case in that a stallion whose actual value was $2,000 was billed at $200. The statute of Iowa avoiding bills of lading limiting a carrier's liability and which was held to be valid by the Supreme Court of Nebraska (just as the Virginia law was held valid by the Supreme Court of North Carolina in the Elliott case) was held by the Supreme Court of the United States not to be valid as against interstate shipments, and the Supreme Court of Nebraska was reversed.

In the Hardwick Farmers' Elevator Company case the suit was

for delay in the delivery of cars which, under the Minnesota Reciprocal Demurrage Law, made the railway liable for damages and a fifty dollar attorney's fee. The Supreme Court of Minnesota sustained a judgment against the railway company for $218 and a $50 attorney's fee. The United States Supreme Court held that by the Act of June 29, 1906, Congress had legislated concerning the delivery of cars in Interstate Commerce by carriers subject to the Act and reversed the Minnesota Supreme Court. The Act of June 29, 1906, declared the term "transportation"

> "shall include cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported; and it shall be the duty of every carrier subject to the provisions of this Act to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates applicable thereto."

This language, the Supreme Court of the United States says, "clearly indicates" that the power of the State over the subject matter ceased to exist from the time the Act came into existence, and states that it is an elementary and long-settled doctrine that there can be no divided authority, the fact that Congress having taken action covers the whole field and "renders the State impotent to deal with a subject over which it had no inherent but only permissive power." Southern Railway *v.* Reid, 222 U. S. 424.

Validity of a Divorce Obtained on Order of Publication in the Matrimonial Domicile—Jurisdiction—Affidavit Based upon Knowledge and Belief.

In Thompson *v.* Thompson, decided January 6, 1913, the Supreme Court of the United States decides that a divorce obtained in Virginia—that State being the matrimonial domicile of the parties—upon an order of publication is valid in the District of Columbia and in every other State of the Union under the "full faith and credit clause" of the Constitution of the United States. There is nothing novel in this decision, as the Court took the same posi-

tion in Atherton *v.* Atherton, 181 U. S. 155. The case is interesting, however, in two other particulars: One in that the court holds that a decree for $75 a month alimony commencing in July, 1909, is sufficient to give jurisdiction although the statute requires that the matter in dispute shall exceed $5,000 in order to give the court jurisdiction.

The court, quoting Smith *v.* Whitney, 116 U. S. 167, holds that the installments of alimony accrued would amount to over one-half of the jurisdictional amount and the expectancy of life of the parties made up the balance.

It seems to us this is stretching the line to a very fine thread.

In Smith *v.* Whitney the petitioner was subject to a prosecution which might end in a sentence dismissing him from the service and thus depriving him of his salary during the residue of his term, which would in less than two years amount to over $5,000. Appellate jurisdiction was sustained. Here was a fixed time limit. In the case at bar there was nothing but a mere expectancy.

The other point of particular interest to Virginians is that the affidavit of non-residence, although based upon information and belief, amounted to legal evidence and was in conformity with the mode prescribed by statute. Section 3250 of our Code provides that "On affidavit that a defendant is not a resident of this State . . . . an order of publication may be entered," etc.

Section 3282 of our Code—quoted by the Court—provides that "where an affidavit is required in support of any pleading, it shall be sufficient if the affiant swear that he believes it to be true." The Court therefore holds that there being no general law or policy in Virginia excluding the use of affidavits based upon information and belief, as far as it is able to discover, such an affidavit is legal evidence of the fact—certainly upon a collateral attack—sufficient to confer jurisdiction upon the Virginia Court.

This decision—though of course not binding authority upon our State courts upon this question—is to the highest degree persuasive and should remove any doubt as to the query raised by us in our editorial upon the new law as to the affidavits of the absence of defendants in divorce proceedings on p. 467, Vol. 18, of the REGISTER.

Federal Regulation of Divorces.

And this reminds us that at a large and enthusiastic gathering of clergy and laymen in New York on January 14, 1913, a "uniform Federal law governing marriage and divorce" was urged and one of the reverend clergy—a Bishop, we believe—spoke of "Federal legislation" on the subject. Of course these gentlemen could hardly have meant "legislation," as the only way in which the Federal government can act would be through a constitutional amendment.

The figures given by Mr. Moody, however, are somewhat startling.

> "The Pacific Coast," said he, "has been the greatest divorce centre not only of this country, but of the entire world, and in that belt of Washington, Oregon, and California, the divorce centre has been San Francisco. In the year 1912 alone there were granted in this country over 100,000 divorces. More than 70,000 children, mostly under the age of ten years, were deprived of one or both parents by divorce. In the forty years alluded to 3,700,000 adults were separated by divorce in the country, and more than 5,000,000 persons were affected by these cases.
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> "The bulk of these cases in that period have been in the Middle Western States, nine of which provided 632,000 divorces, or practically half of all the divorces in the country. Illinois alone provided 120,000 divorces, and for this reason we have deemed it wise to make the beginning of our movement in that State, where we now have a commission on marriage and divorce striving to bring about reform of the marriage and divorce laws and work for country-wide uniformity thereof. Pennsylvania had 55,760 divorces, the State of California 50,000, and that of New York 44,450.
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> "New York State, however, sent 18,169 of its couples into other States to procure divorces, and probably 10,000 more persons who obtained divorces without leaving records of their place of marriage. Thus New York's total is probably 80,000 divorces. These migratory divorces, cases sent from the State into another, constitute 66 per cent. of the divorces in Connecticut, 50 per cent. of those in New York, and 42 per cent. of those in New Jersey. Most of these were procured elsewhere than in the State where the parties lived in order to defeat the ends of real justice where there was no clear case justifying divorce.
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> "In twenty years 170,000 cases out of the total of 900,000 divorces were brought on with change of residence—migra-

tory divorces. From 25 to 50 per cent. of the children in our reform schools have been found to have got there because of the separation of their parents.

"In this country there is a pressing necessity of legislation requiring every State to see to it that both the parties in every divorce suit are represented. At present 90 per cent. of the cases go by default, with only one party represented. In Reno, for example, divorces are granted on the utterly uncorroborated testimony of one party to the suit."

If these figures are true—and we see no reason to doubt them—it does appear that some reform in our laws as to divorce is sadly needed. But can the Federal government—any more than the States—check this tendency of unhappy couples to drift apart? We do not believe an amendment to our Constitution on this subject would get the required number of States to adopt it. Nor are we in favor of extending the power of the Federal government one inch further than it has now been extended. Only an appeal to the consciences of men and women and an awakening to the horrors of the situation can, in our judgment, check this evil.

The printer's devil, who had been reading over our shoulder as he impatiently waited for copy, asked if we did not think that the Federal courts might get jurisdiction under the "Commerce Clause" or "Police Power." He was out of sight before we could give the rebuke the query demanded.

Marching on.

Like the soul of that notorious individual who met his just fate at Charlestown some fifty years ago, law reform is steadily marching on. In the State of New York the Board of Statutory Compilation, which a few years ago performed the big task of compiling the consolidated laws of the State of New York, has made a report to the governor of that State suggesting a method to simplify procedure both in the criminal and civil courts. As is well known New York has for many years been practicing under Fields' Code—an attempt to simplify law pleading which in fact made it more cumbersome and brought questions of pleading more before the courts than even the common law had done. The difficulty with Mr. Fields' Code of Practice was that he attempted

in a huge volume what ought to have been done in a few pages. The State of Connecticut by the simplest sort of a practice act has succeeded in doing what Mr. Fields vainly attempted to do and which the present Board of Statutory Compilation now asks the governor of New York to recommend to the Legislature. This board is composed of probably as able lawyers as can be found in the country: Judge Adolphus J. Rodenbeck, William B. Hornblower, John G. Milburn, and Charles A. Collins. These eminent lawyers in their report recommend that the present code, which is encumbered with innumerable and incongruous amendments, be abandoned and that in its place the following be adopted:

A short practice act which would preserve the essentials in the present code adapted to present conditions.

Rules of court, subject to adoption, amendment, and repeal by the Judges themselves, and leaving to the Judges themselves large discretionary powers in the matter of minor details of practice, where no danger exists that such discretionary powers may be abused.

Changes to simplify and modernize the practice of law, thus hastening the final determination of legal controversies and doing away with the law's delays.

The changes recommended include:

Power for the courts to disregard at any stage of a case any technical errors, defects or irregularities is procedure which do not vitally affect the rights of either party.

Provision authorizing the higher courts to disregard errors of a non-essential nature by the lower courts and to obviate more than one trial of a case.

Abolition of the demurrer, rendering all relief for defective pleading subject to motion.

It is to be earnestly hoped that the great State of New York will set the other States of the Union an example and appoint these distinguished gentlemen a board to carry out the recommendations which they urge.

Disregard of Technicalities by the Supreme Court of the United States.

And apropos of law reform it is to be hoped that the inferior courts of the Union on questions of pleading may take note of the opinion of the Supreme Court of the United States in the N. K. & T. R. Co. *v.* Wulf, decided on January 6, 1913. In this case one Sallie C. Wulf, in her individual capacity, commenced an action on January 23, 1909, in the United States Circuit Court for the Eastern District of Texas to recover damages for the death of her son, which occurred in November, 1908, whilst he was a locomotive fireman in the employment of the defendant company and in the performance of his duties upon a train in the State of Kansas. Wulf's death was caused by the negligence of the railroad company. The complaint alleged that the plaintiff, the mother of said Wulf, was a feme sole, that he was an unmarried man leaving no wife or children surviving him, and that his father having died prior to his death the plaintiff was the sole heir, next of kin and beneficiary of his estate. There was no administration upon his estate. He was a resident of Texas but was temporarily working in Kansas. The usual offense of contributory negligence, etc., was set up to this action, which was brought under the laws of the State of Kansas. About eighteen months after the action was brought the defendant company filed several demurrers, one of which was that the plaintiff's decedent being upon a train engaged in interstate commerce the cause of action was not governed by the laws of Kansas but arose out of the Federal Employees' Liability Act of 1908. The plaintiff thereupon amended her petition and stated that on January 4, 1911, two days before the amended petition was filed, she was duly appointed temporary administratrix of the estate of her son, in Grayson County, Texas, and set forth in her petition that she did not believe that there was any necessity for such administration unless the same should be necessary for the sole purpose of prosecuting this suit. She therefore sues in her original capacity as such sole beneficiary and next of kin, but prays that if she was not entitled to recover in such capacity she might be allowed to recover as administratrix for her own benefit. She further sets up both the laws of Kansas and the act of

Congress as establishing her right to sue for her son's death. Of course all this was excepted to, especially because she was not made a party as administratrix at the time of her filing of the original petition; and further set up the defense that her appointment as administratrix was made more than two years from the time the alleged cause of action occurred, and for this reason the action was barred by limitation. The exceptions were overruled and there was a verdict and judgment for seven thousand dollars in favor of the plaintiff. An appeal was taken to the Supreme Court of the United States, which affirmed this decision and held that the amendment was clearly within § 954 of the Revised Statutes, and brushed aside the plea of the statute of limitations on the ground that it introduced no new or different cause of action nor set up any different set of facts as to the ground of action, and therefore related back to the beginning of the suit. The court was equally curt in disposing of the fact that the action was brought under both the State and Federal law. Mr. Justice Lurton, however, entertained doubt as to whether the two years limitation did not apply, but filed no dissenting opinion.

No one who desires to see substantial justice done in courts of justice can for one moment doubt that this decision was proper and right, and the technicalities by which liability was sought to be avoided were such as the court should have entirely disregarded.

Law Procedure. Reform in Federal

A committee of the American Bar Association has been appointed to ask Congress to give power to the Supreme Court of the United States to simplify the practice of law in the Federal Courts. In the last number of the REGISTER we gave the new Equity Rules which have been adopted by the Supreme Court of the United States. These rules, however, do not affect the present system of procedure at law in the Federal courts. Today the system varies in every State, as it is influenced by the local practice. In New York, for instance, there are 2,850 sections of the code of civil procedure. In some States the practice is much simpler. The rules in equity for all the Federal courts recently laid down by the Supreme Court of the United States are only eighty-one in number. The American Bar

Association hopes to effect a similar reform in the practice of law which would result in greatly cheapening and expediting the administration of justice in those courts.

The committee is made up of Thomas W. Shelton of Virginia, chairman; Jacob M. Dickinson of Nashville, former Secretary of War; William B. Hornblower of this city, Louis D. Brandels of Boston, and Joseph N. Neal of Portland, Ore.

Mr. Shelton some time since explained the reason for the appointment of the committee as follows:

"The Federal courts have never considered it a duty to follow State procedure, and are daily departing from it through amendments by Congress and by their own rules. The result is neither conformity with State practices, a court-made system of rules, nor a statutory code procedure. It is neither the one nor the other—it is a patchwork. The Supreme Court of the United States has just completed a system for the equity side in the Federal courts, Congress having given it that power years ago. Therefore let Congress set the Supreme Court free as to the law side of the courts. If the people and the press will work as energetically with Congress as they have complained of the courts, complete satisfaction will be had, both in expedition and result."

Charles A. Boston of Hornblower, Miller & Potter, Chairman of the Section of Legal Education of the American Bar Association, said:

"It is thought, if Congress can be induced to authorize the Supreme Court of the United States to prescribe uniform rules of practice for the Federal courts sitting at law as they have done in equity, admiralty, and bankruptcy, the Supreme Court would certainly adopt a simple system similar to the New Jersey and Connecticut systems, and while this could not be forced upon any of the State courts, it would be such an example of what a simple practice could be made that sooner or later its example would cause other States to follow the lead of the Supreme Court of the United States in the matter. Thus the greater amount of the law's technicalities would be eliminated, because the technicalities of which we hear so much complaint are mostly caused by the statutes relating to practice."

All of which is a consummation most devoutly to be wished.